# STATE OF MICHIGAN

# COURT OF APPEALS

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GERALD DURONIO, Individually and as Class Representative, on behalf of all others similarly situated,

Plaintiff-Appellant,

v

MERCK & COMPANY, INC., ANDREA BENJAMIN, RUBIN BENJAMIN, ANGEL KLEIN, KATHY LINDSEY, STEVE MOGRIDGE, and FAWAZ NAJA,

Defendants-Appellees.

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UNPUBLISHED
June 13, 2006

No. 267003
Wayne Circuit Court
LC No. 04-434718-CP

Before: Whitbeck C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant Merck & Company, Inc. (Merck), pursuant to MCR 2.116(C)(8). Because the trial court properly determined that plaintiff's common-law fraud claim is, in substance, a product liability action subject to the absolute defense established by MCL 600.2946(5), and because the trial court correctly determined that the exemption in MCL 445.904(1)(a) applies to plaintiff's MCPA claim, the trial court properly dismissed plaintiff's action, and we affirm.

## I. Facts and Proceedings

This action arises from Merck's withdrawal of the prescription drug Vioxx from the market. Plaintiff originally filed this action against Merck and other corporate defendants in November 2004, but plaintiff only named Merck and its alleged pharmaceutical representatives defendants his second amended complaint. Plaintiff alleged that Merck disseminated information to the general public that concealed or downplayed potential cardiovascular risks and falsely implied that Vioxx provided superior pain relief to over-the-counter medications, and that Merck's pharmaceutical representatives misled prescribing physicians regarding the safety of Vioxx for their patients.

Plaintiff sought a refund of the purchase cost of Vioxx, as well as costs and related expenses for a medical consultation recommended by the federal Food and Drug Administration (FDA) and Merck in connection with Merck's voluntary withdrawal of Vioxx from the market.

Plaintiff sought recovery based on common-law fraud and the Michigan Consumer Protection Act (MCPA), MCL 445.901 *et seq.* Plaintiff also sought class certification under MCR 3.501 for all Michigan residents residing in Wayne County who have "since the FDA approval of Vioxx in 1999, taken the drug and who have not suffered death, a heart attack, stroke, or other cardiovascular or personal injury or damage to property due to Vioxx and who have already undergone and/or will undergo the single medical consultation recommended by the FDA, Merck and/or health care professionals."

The trial court dismissed the individual defendants pursuant to the parties' stipulation. The trial court adjourned any decision on plaintiff's request for class certification until after consideration of Merck's motion for summary disposition under MCR 2.116(C)(8). The court subsequently granted Merck's motion, finding that plaintiff's liability theories, in substance, constituted a product liability action as defined in MCL 600.2945(h) of the Revised Judicature Act (RJA) and, therefore, Merck was entitled to immunity from liability under MCL 600.2946(5), given that plaintiff did not plead any constitutional exception to immunity.

## II. Standard of Review

We review the interpretation and application of a statute de novo as a question of law. *Health Care Ass'n Workers Compensation Fund v Director of the Bureau of Worker's Compensation*, 265 Mich App 236, 243; 694 NW2d 761 (2005).

> The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. It is presumed that the Legislature intended the plain and obvious meaning it expressed. If the terms of a statute are ambiguous, judicial construction is appropriate. The Court must apply a reasonable construction that considers the purpose of the statute and the harm it is designed to remedy. The Court must give effect to every word, clause, and sentence, presuming that each is used for a purpose. Likewise, the Court should avoid a statutory construction that renders any portion of the statute surplusage or nugatory. The provisions of a statute must be read within the context of the entire statute so as to produce a harmonious and consistent enactment. [*Id.* at 243-244 (citations omitted).]

A trial court's grant of summary disposition is also reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim based on the pleadings alone. *Id.* at 119-120. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. The motion may be granted only if the claim is so clearly unenforceable as a matter of law that no factual development could possible justify recovery. *Id.* Although the trial court granted summary disposition under MCR 2.116(C)(8), subrule (C)(7) is the appropriate subrule to apply where a claim is barred by immunity granted by law. An

appellate court may review a trial court's decision under the correct rule. *Spiek v Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under subrule (C)(7), the allegations in a complaint are accepted as true, unless contradicted by proofs submitted by the parties.[1] *Maiden, supra* at 119.

III. Analysis

Plaintiff argues that the trial court erred in characterizing his action as a product liability action within the meaning of MCL 600.2945(h). In general, tort law has provided the source for a product liability action. See *Neibarger v Universal Cooperatives, Inc*, 439 Mich 512; 486 NW2d 612 (1992), and *Prentis v Yale Mfg Co*, 421 Mich 670, 682-683; 365 NW2d 176 (1984). In the case of an individual consumer, "the remedy for products liability is not premised upon an agreement between the parties, but derives either from a duty imposed by law or from policy considerations which allocate the risk of dangerous and unsafe products to the manufacturer and seller rather than the consumer."[2] *Neibarger, supra* at 523.

As added by 1978 PA 495, MCL 600.2946 established certain evidentiary standards for a product liability action. Evidence of compliance with governmental or industry standards was admissible to determine if the standard of care was met. *Taylor v Gate Pharmaceuticals,* 468 Mich 1, 6; 658 NW2d 127 (2003). At that time, MCL 600.2945 defined a "[p]roducts liability action" as "an action based on *any* legal or equitable theory of liability brought for on or account of death *or injury to person or property* caused by or resulting from the manufacture . . . marketing, advertising, packaging, or labeling of a product or a component of a product" (emphasis added). Later, 1995 PA 161, modified the definition section to use the phrase "injury to person or damage to property." The legislature replaced the word "any" preceding "legal or equitable theory" with the word "a."

The legislature substantially revised MCL 600.2945 to include a number of definitions, but retained the "injury to person or damage to property" phrase in the definition of "product liability action." 1995 PA 249.

> "Product liability action" means an action based on a legal or equitable theory of liability brought for the death of a person or for *injury to a person or damage to property* caused by or resulting from the production of a product. [MCL 600.2945(h) (emphasis added).]

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[1] Regardless of which subrule applies, the result in this case would be the same because we are presented only with a question of law to be determined solely from the pleadings.

[2] The existence of a duty is also a necessary element for a fraud claim where it is claimed that information was suppressed. See *Hord v Environmental Research Institute of Michigan,* 463 Mich 399, 412; 617 NW2d 543 (2000); *Bergen v Baker,* 264 Mich App 376, 382; 691 NW2d 770 (2004).

The word "product" is defined separately as "any and all component parts to a product," MCL 600.2945(g), and "production" is defined as "manufacture, . . . warning, instructing, marketing, selling, advertising, packaging, or labeling," MCL 600.2945(i).

The legislature also substantially modified MCL 600.2946 through its adoption of 1995 PA 249. Subject to two exceptions, MCL 600.2946(5) now establishes an absolute defense for drug manufacturers and sellers in a product liability action, where the drugs complied with FDA standards and labeling. *Taylor, supra* at 6-7. Under MCL 600.2946(5), "a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration, and the drug and its labeling were in compliance with the United States food and drug administration's approval at the time the drug left the control of the manufacturer or seller. . . ."

Thus, plaintiff's common-law fraud claim is subject to the absolute defense established by MCL 600.2946(5) if it falls within the definition of "product liability action" in MCL 600.2945(h). Although we must accept the factual allegations in plaintiff's second amended complaint as true for purposes of deciding this issue, *Maiden, supra* at 119, we are not bound by a party's choice of labels for its action because this would put form over substance. See *Kostyu v Dep't of Treasury*, 170 Mich App 123, 130; 427 NW2d 566 (1988). Plaintiff's mere allegation that he is not pursuing a product liability action is not controlling.

Because plaintiff did not allege any injury to his person, the trial court could only find a legal or equitable theory falling within the scope of MCL 600.2945(h) if plaintiff's action could be characterized as one for "damage to property" caused by or resulting from the production of Vioxx. We reject Merck's claim that plaintiff failed to preserve this particular issue for appeal. The fact that an appellant did not fully brief and argue an issue in the trial court, or that it cites authority on appeal that the trial court did not consider, does not preclude the appellant from raising the issue on appeal. *Steward v Panek*, 251 Mich App 546, 554; 652 NW2d 232 (2002). Furthermore, we may consider the issue because it presents a question of law. *Id.*

Merck attempts to equate "damage to property" with "economic loss." We are not persuaded by Merck's assertions, because had the Legislature intended this, it would have used the phrase "economic loss," which is defined in MCL 600.2945(c), in place of "damage to property" in MCL 600.2945(h). The phrase "damage to property" is not defined in the statute so we turn to dictionary definitions to determine its plain meaning, keeping in mind the context in which it is used. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 533; 697 NW2d 895 (2005); *Wessels v Garden Way, Inc*, 263 Mich App 642, 649; 689 NW2d 526 (2004). The *Random House Webster's College Dictionary* (1997) defines "property" as "1. that which a person owns; the possession or possessions of a particular owner. 2. goods, land, etc., considered as possessions. 3. a piece of land or real estate. 4. ownership; right of possession, enjoyment or disposal, esp. of something tangible. . . ." Also instructive is 63C Am Jur 2d, Property, § 1, which broadly defines "property" as encompassing the bundle of rights associated with an object:

> As a matter of legal definition, "property" refers not to a particular material object but to the right and interest in an object. "Property" in a thing does not consist merely in its ownership or possession, but also in the lawful,

> unrestricted right of its use, enjoyment, and disposal. In its precise legal sense, property is nothing more than a collection of rights.
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> In contemporary jurisprudence, "property" refers to the various incorporeal ownership rights in a res, such as the right to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the res, as well as to the actual physical object of these rights. [(Internal footnotes and citations omitted.)]

The word "damage" is defined in *Random House Webster's College Dictionary* (1997) as "injury or harm that reduces value, usefulness, etc.", while "damages" refers to "the estimated money equivalent for loss or injury sustained." In *Universal Underwriters Ins Co v Kneeland*, 464 Mich 491, 496-497, 628 NW2d 491 (2001), our Supreme Court indicated that "damages" could refer to any harm caused to a third-party person or property, or losses for which there is a legal right to recovery, when finding ambiguity in a courtesy car agreement in which the renter agreed to assume all responsibility for damages while the vehicle was in his possession. In *Smolen v Dahlmann Apartments, Ltd*, 127 Mich App 108, 114-115; 338 NW2d 892 (1983), this Court found that the ordinary meaning of "damage" included injury to something, when construing a statutory provision providing that a renter's security deposit may only be used to reimburse the landlord for "actual damages to the rental unit . . . ." This Court determined that a rental unit that required cleaning was not damaged. *Id.* at 115.

MCL 600.2945(h) does not use the word "damages," but rather requires an "action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person *or damage to property* caused by or resulting from the production of a product." Examined in context, we reject plaintiff's claim that "damage to property" only encompasses physical damage to property. The phrase is broad enough to include both physical damage to an object and injury or harm to rights or interests associated with an object, so long as the damage is caused by or results from the production of the product. Cf. *Holtz v Bd of Comm'rs of Elkhart Co*, 560 NE2d 645, 647 (Ind, 1990) ("damage to property" in definition of "loss" under Indiana's Tort Claims Act includes injury to property rights and interests); see also *Indiana Dep't of Transportation v Shelly & Sands, Inc*, 756 NE2d 1063, 1077 (Ind App, 2001) (claim against state for corporate lost profits and additional costs subject to Indiana's Tort Claims Act if it sounds in tort).

The fact that the alleged injury in this case is in the form of monetary loss does not preclude application of MCL 600.2945(h). Money itself is a form of property, *Garris v Bekiares*, 315 Mich 141, 148-149; 23 NW2d 239 (1946), and a consumer's expenditure of money for overvalued goods can constitute an injury to property. Cf. *Reiter v Sonotone Corp*, 442 US 330, 99 S Ct 2326; 60 L Ed 2d 931 (1979) (in antitrust action, an injury to "property" occurred when retail purchasers purchased consumer goods artificially inflated by anticompetitive conduct).

Plaintiff asserts that he is seeking rescission for a fraudulently induced purchase contract. In light of plaintiff's failure to adequately brief any basis for a rescission remedy against Merck, we deem this issue abandoned. An appellant may not merely announce a position and leave it to

this Court to discover and rationalize its basis. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). While rescission of a contract is an appropriate remedy for fraud in the inducement, plaintiff's request for a refund of the purchase price of Vioxx is nothing more than a claim against a noncontracting party for monetary losses measured by the cost to purchase Vioxx. Further, plaintiff presented the claim as arising from misrepresentations and omissions, and denied that the alleged concealed risks of using Vioxx ever materialized for him, but it is clear that the safety and efficacy of Vioxx is essential to his monetary loss claim.

Because plaintiff brought the claim for damage to property (money) caused by or resulting from the production (marketing, selling, advertising, packaging, or labeling) of Vioxx, plaintiff's pleaded common-law fraud claim for a refund of the cost of purchasing Vioxx is, in substance, a product liability action within the meaning of MCL 600.2945(h). Assuming for purposes of our review that plaintiff's request to have Merck pay for a medical consultation is actionable in tort, plaintiff's alleged loss of a right or interest in money to obtain a medical consultation constitutes damage to property within the meaning of MCL 600.2945(h). Any additional claim for lost income or expenses to obtain the medical consultation is merely a pecuniary loss flowing from that injury. *Citizens for Pretrial Justice v Goldfarb*, 415 Mich 255, 268; 327 NW2d 910 (1982).

The trial court properly determined that plaintiff's common-law fraud claim is, in substance, a product liability action subject to the absolute defense established by MCL 600.2946(5). Plaintiff raises an argument concerning the validity of MCL 600.2946(5), but because it is not set forth in the statement of the questions presented, plaintiff failed to preserve this argument for our consideration. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338; 351; 539 NW2d 781 (1995). Although we are empowered to overlook plaintiff's improper presentation of this argument, *Health Care Ass'n Workers Compensation Fund, supra* at 243, we are not persuaded that the Sixth Circuit Court of Appeals improperly decided in *Garcia v Wyeth-Ayerst Laboratories*, 385 F3d 961 (CA 6, 2004), that the fraud-on-the-FDA exception in MCL 600.2946(5)(a) is partially preempted by federal law. Although we are not bound to follow the decision in *Garcia*, see *Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004), we agree with its holding that the fraud-on-the FDA exception is preempted by federal law unless the FDA itself determines that it was defrauded. Examined in this context, plaintiff has not established that the trial court erred in granting summary disposition in favor of Merck with respect to plaintiff's claim alleging common-law fraud. In light of this decision, we decline to address the parties' remaining arguments regarding whether there are alternative grounds for affirming the trial court's order of summary disposition with respect to the common-law fraud claim.

Next, we turn to plaintiff's Michigan Consumer Protection Act (MCPA) claim. MCL 445.901 *et seq*. Although the trial court did not decide whether plaintiff pleaded a cognizable claim under the MCPA, we will overlook this preservation requirement to consider this issue of law. *Miller v Inglis* 223 Mich App 159, 168; 567 NW2d 253 (1997). This claim is based on the same factual allegations and seeks the same remedy as plaintiff's common-law fraud claim. Both claims rely on alleged misrepresentations related to the safety and efficacy of Vioxx. The MCPA protects Michigan's consumers by prohibiting various methods, acts, and practices in trades or commerce. *Slobin v Henry Ford Health Care*, 469 Mich 211, 215; 666 NW2d 632 (2003); *Zine v Chrysler Corp*, 236 Mich App 261, 275; 600 NW2d 384 (1999). The legislature

intended the MCPA to provide an "enlarged remedy for consumers who are mulcted by deceptive business practices." *Dix v American Bankers Life Assurance Co,* 429 Mich 410, 417; 415 NW2d 206 (1987). It authorizes class actions for damages by a person who suffers a loss and by the attorney general, MCL 445.910(5) and MCL 445.911(3). The MCPA's exemptions are established by MCL 445.904, and MCL 445.916 states that "[t]his act shall not affect any other cause of action which is available."

We must give a reasonable construction to a statute that considers its purpose and the harm that it is designed to remedy. *Health Care Ass'n Workers Compensation Fund, supra* at 244. The Legislature is presumed to be aware of existing statutes when enacting new laws. *Inter Cooperative Council v Dep't of Treasury,* 257 Mich App 219, 227; 668 NW2d 181 (2003). Based on the clear and unambiguous language of the MCPA, the MCPA does not affect a product liability action, as defined in MCL 600.2945(h), if it is available to a plaintiff. The RJA, while using broad language to define a "product liability action" as an "action based on a legal or equitable theory of liability . . ." in MCL 600.2945(h), likewise does not bar a MCPA claim. To hold otherwise would, in effect, render the ability of a person and the attorney general to pursue a class action for damages under the MCPA a nullity, where the claim is based on deceptive advertising practices for a product, because the definition of "production" in the RJA includes "advertising." MCL 600.2945(i). A court should avoid a construction that renders any portion of a statute surplusage or a nugatory. See *Health Care Ass'n Workers Compensation Fund, supra* at 244; *Inter Cooperative Council, supra* at 225.

MCL 445.904(1)(a) provides that the MCPA does not apply to "[a] transaction or conduct specifically authorized under laws administered by a regulatory board or officer acting under statutory authority of this state or the United States." The focus of this statutory provision is not the specific misconduct alleged by a plaintiff, but whether the general transaction is authorized by law. *Smith v Globe Life Ins Co,* 460 Mich 446, 464-465; 597 NW2d 28 (1999); see also *Newton v Bank West,* 262 Mich App 434, 438-440; 686 NW2d 491 (2004) (holding that the MCPA exemption applies to a residential mortgage transaction made by federal savings bank under laws administered by regulatory board or its officers); *Kraft v Detroit Entertainment, LLC,* 261 Mich App 534, 540-542; 683 NW2d 200 (2004) (MCPA exemption applies to the operation of slot machines regulated and authorized by state statute).

The Food, Drug, and Cosmetic Act of 1938 (FDCA), 21 USC 301 *et seq.*, governs drug marketing, manufacturing, and distribution, and vests the FDA with powers to enforce regulations. *Thompson v Western States Medical Ctr,* 535 US 357, 361; 122 S Ct 1497; 152 L Ed 2d 563 (2002). The regulations implementing the FDCA are extensive and detailed, and specifically regulate prescription drug advertising. *Bober v Glaxo Wellcome PLC,* 246 F3d 934 (CA 7, 2001); 21 CFR 202.1. Because the general marketing and advertising activities underlying plaintiff's MCPA claim are authorized and regulated under laws administered by the FDA, the exemption in MCL 445.904(1)(a) applies to plaintiff's MCPA claim. The trial court properly dismissed plaintiff's MCPA claim.

In light of this holding, we do not address the parties' arguments concerning whether plaintiff sufficiently pleaded the requisite "loss" for purposes of MCL 445.911(2) and (3) to

bring an individual or class action for damages.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Pat M. Donofrio